IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

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| UNITED STATES OF AMERICA, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| V. | ) | CR00-S-422-S |
| | ) | |
| ERIC ROBERT RUDOLPH, | ) | |
| | ) | |
| Defendant. | ) | |

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR PRESERVATION, *IN CAMERA* PRODUCTION AND/OR DISCOVERY OF ROUGH NOTES

COMES NOW Eric Robert Rudolph, by and through his undersigned counsel of record, and hereby respectfully files this reply to the Government's Response to Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Federal Rule of Criminal Procedure 16(a)(1)(E) and the Jencks Act, and, as grounds states, as follows:

I. Introduction

First, it should be noted that the defendant's initial filing for the handwritten notes of law enforcement officers was filed in the context of a case in which the government seeks to have Eric Rudolph executed. The documents sought to be received in discovery, or reviewed *in camera* by this Honorable Court, are merely the contemporaneous notes written by law enforcement officers during thousands of interviews. These notes should reflect the actual words used by the witnesses at the time of the interviews. The 302's which are merely summaries, will often, intentionally or unintentionally, contain an

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agent's interpretation of what the witness had to say as opposed to the exact words used. Given the nature of these documents, they would be turned over as a matter of course in a case involving money damages; i.e., a car accident case. Given that what is at issue in this matter is far more sobering than monetary damages, the defense, or this Honorable Court, ought, in fairness, should be able to read these notes of the federal agents and law enforcement officers to determine whether or not there is information contained therein which is favorable to Rudolph in the defense of his life and liberty. The defense position in this regard is firmly grounded in the Federal Rules of Criminal Procedure and the United States Constitution.

Second, the Government's Response to Defendant's Motion for Preservation, *In Camera* Production, and/or Discovery of Rough Notes (hereafter "Government's Response"), relies on its assertion that "the defendant can offer nothing other than pure conjecture to establish that the rough notes should be produced" and, therefore, that an *in camera* review of the rough notes is not be justified. Government's Response at 11. The defense has reviewed, specifically for the purpose of this motion, many, but not nearly all, of the 302's previously provided by the government and have found that there are numerous internal inconsistencies, inconsistencies between interviews and, on many occasions, the obvious exclusion of relevant material. In addition, the defense has found many documents which suggest that the rough notes[1] will, in fact, contain much exculpatory and impeaching information.

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[1] For purposes of this motion, "rough notes" is used broadly to include, but is not limited to, notes taken by law enforcement, drafts of 302's, and drafts of affidavits intended to be used for the purpose of obtaining search warrants.

If for example, an agent drafted an affidavit in order to justify the search of a suspect's property, but ultimately obtained the suspect's consent prior to seeking a search warrant, it is very likely that the unused affidavit contains both Brady and Rule 16 material. Likewise, if an agent drafted a 302 and later replaced it

This reply will detail the legal justification requiring the production, or in the alternative, the *in camera* review of all of the rough notes in this case. Finally, the defense will supply this Honorable Court with various instances which demonstrate that the rough notes should be produced.[2]

II. The Application of Fed.R.Crim.P. 16(a)(1)(E)

Fed.R.Crim.P. 16(a)(1)(E) requires the production, or the *in camera* review, of all of the rough notes in the possession of the government. Rule 16(a)(1)(e) provides that the government must disclose any tangible items that are *material* to the preparation of the defense. Rule 16(a)(1)(E) states in relevant part:

> Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
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> ***(i) the item is material to preparing the defense***

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with a "final" 302, and the changes between the documents are material, the draft would contain both Brady and Rule 16 material.

[2] In its initial filing the defendant asserted in its argument that the rough notes may represent Jencks material stating that there is "every reason to believe that the raw notes are in fact substantially verbatim accounts of the witnesses." Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes at pg. 6. After reviewing many, but not all of the 302's, for the purpose of this filing it is actually unlikely that the 302's are truly representative of the rough notes. Therefore, inasmuch as there are material differences between the 302's and the rough notes, the defendant does not rely upon the Jencks Act. To the extent that some of the rough notes are determined to be consistent with the accompanying 302, it would seem that there is much less harm in the government producing duplicative discovery than failing to provide required discovery, especially in a case involving the death penalty. Further, should the Court undertake the task of reviewing all of the rough notes the Defendant asserts that where there are no material differences between the rough notes and the 302 that the material contained therein is in fact Jencks material and is due to be produced to the Defendant. Finally, should the court determine that the defendant has not made a showing of materiality, i.e., material differences between the 302's and the rough notes, presumably the court would have found that there is no material difference between the rough notes and the 302's and therefore the defense would move this Honorable Court for an *in camera* inspection to determine whether or not the notes are sufficiently similar to the 302's to be considered Jencks material.

(Emphasis added)

The government attempts in its response to establish an extraordinarily high standard of materiality, namely a "reasonable probability of a different result," in order to compel production.[3] Government's Response at 3. This position is not faithful to Supreme Court, Circuit Court or District Court precedent. *See Kyles v. Whitney*, 514 U.S. 419, 434 (1995); *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003), *cert. denied* 124 S. Ct. 133 (2003); *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990); *United States v. Siegfried*, 2000 U.S. Dist. LEXIS 10411, 4 (N.D. Ill. 2000); *United States v. Liquid Sugars*, 158 F.R.D. 446, 472 -473 (E.D. Cal 1994). Initially, the quote from *Kyles* the government uses to establish this test of materiality is taken out of context when one looks to the full opinion. Read in full, the Court stated, "A showing of materiality *does not require demonstration by a preponderance that disclosure of suppressed evidence would have resulted in the defendant's acquittal...Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and *the adjective is important*. The question is *not* whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. (Emphasis added). Therefore, the test is not the probability of a different outcome, but only whether the defendant received a fair trial and whether the evidence "in the eyes of a neutral and objective observer could alter the outcome of the proceedings." *Jordan*, 316 F.3d at 1252.

[3] "[the] touchstone of materiality is a 'reasonable probability of a different result." government's Response at 3 (quoting *Kyles,* 514 U.S. at 434).

It is important to note that the materiality standard espoused in *Kyles* and *Bagley* is only applicable for appellate review. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles*, 514 U.S. at 434. In both of these cases, the Court was dealing with the question of whether one's conviction should be overturned because of error. *Bagley*, 473 U.S. at 669; *Kyles*, 514 U.S. at 421-422. However, in pretrial proceedings, the Supreme Court and several federal courts have indicated that there should be an **even lower standard of materiality**. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure"); *Liquid Sugars*, 158 F.R.D. at 472 -473; *Mandel*, 914 F.2d at 1219 ("It is not necessary for a defendant to make as strong showing of materiality to uphold the trial court's granting discovery as it would to overturn a denial of discovery"); *Siegfried*, 2000 U.S. Dist. LEXIS at 4 ("The fact that denial of discovery might ultimately turn out on appeal not to have prejudiced the defendant...is not a compelling reason for a trial court not to order discovery in the first place. Unlike the Court of Appeals, this Court has not seen or heard the evidence at trial and cannot say whether the information requested will turn out to be insignificant or that its non-production ultimately will not demonstrably prejudice the defense"). As the Court in *Liquid Sugars* explained:

> The Court of Appeals has the benefit of hindsight, i.e., it can assess the significance of the requested but not disclosed evidence against the backdrop of precisely what facts were introduced at trial which demonstrate the defendant's guilt. Prior to trial, this court has no such benefit. Requiring a district court to predict what will change the verdict months before it is ever decided is a markedly impossible directive. This court cannot prognosticate pre-trial to a probability that a defendant will be acquitted if his or her discovery is allowed. Nor can this court even determine pre-trial whether the granting of the request

> will significantly alter the quantum of proof in the defendant's favor...the test set forth by this court for pre-trial assessment of materiality – significantly helpful to an understanding of important evidence – is a workable, fair, non-burdensome test.

*Liquid Sugars*, 158 F.R.D. at 472-473.

Therefore, although the defendant must show that the requested evidence "bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor," *United States v. Ross*, 511 F.2d 757, 762-3 (5th Cir. 1975), *cert. denied* 423 U.S. 836 (1975); *followed by Jordan*, 316 F.3d at 1251, "This materiality standard normally 'is not a heavy burden,' (internal citation omitted); rather, evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal' (internal citation omitted)." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (quoting *United States v. Felt*, 491 F. Supp. 179, 186 (D.D.C. 1979)); *followed by Liquid Sugars*, 125 F.R.D. at 471; *United States v. Bergonzi*, 214 F.R.D. 563, 577 (N.D. Cal. 2003); *United States v. Jackson*, 850 F. Supp 1481, 1503 (D. Kan. 1994); *State v. Johnson*, 778 So. 2d 706, 713 (La. Ct. App. 2001).

Because the defendant demonstrates, *infra*, that there are some significant discrepancies and inconsistencies in some of the documents provided to date, this showing is enough to cross this lowered materiality standard, and require disclosure from the government. The discrepancies discussed, *infra*, evince the 302 reports could have been "distorted because of overzealousness on the part of the agent preparing it." *United States v. Harrison*, 524 F.2d 421, 430 (D.C. Cir. 1975) (where the Court found that

agents' rough notes are potentially discoverable material because, "It seems too plain for argument that rough notes from any witness interview could prove to be *Brady* material"). Further, the nature of the documents, as well as the inconsistencies and discrepancies, demonstrate materiality in two ways: they contain exculpatory information, and effective impeachment of government witnesses is impossible without them. *Id.* at 427.

Moreover, as the 11th Circuit Court of Appeals recognized in *Jordan*, Rule 16 is " 'intended to prescribe the minimum amount of discovery to which the parties are entitled,' and leaves intact a court's 'discretion' to grant or deny 'broader' discovery requests of a criminal defendant." *Jordan*, 316 F.3d at 1249 (quoting Notes of Advisory Committee on 1974 Amendments to Federal Rules of Criminal Procedure, *Fed. R. Crim. P. Rule 16*). The potential imposition of the death penalty, courts have held, leads to a broader right of discovery. *See Ex Parte Monk*, 557 So. 2d 832, 836-837 (Ala. 1989); *followed by Duncan v. State*, 575 So. 2d 1198, 1202 1203 (Ala. Crim. App. Ct 1990), *cert. denied* 513 U.S. 1007 (1994). The Court in *Ex Parte Monk* ruled, "The hovering death penalty is the special circumstance justifying broader discovery in capital cases." *Monk*, 557 So. 2d at 836-837. As the Supreme Court said, "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even in close cases, the law, in order to give a doubtfully condemned man another chance." *Stein v New York*, 346 U.S. 156, 196 (1953), *overruled for other reasons by Jackson v Denno*, 378 U.S. 368, 391 (1964); see also *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) ("From the point of view of the defendant, it [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life

of one of its citizens also differs dramatically from any other legitimate state action"). Thus, the special circumstances in this case, i.e., the potential imposition of the death penalty, should compel this Honorable Court to give broader discovery rights than in other criminal cases.

Additionally, pursuant to Rule 16, many federal and state courts have found that a defendant has a right to discovery of the underlying procedures of scientific evaluations by expert witnesses, as well as these witnesses' bench and lab notes. *See United States v. Zanfordino*, 833 F. Supp. 429 (S.D.N.Y. 1993); *United States v. Green*, 144 F.R.D. 631, 639 (W.D.N.Y. 1992), *cert. denied* 519 U.S. 955 (1996); *Liquid Sugars*, 158 F.R.D. at 470; *Siegfried*, 2000 U.S. Dist. LEXIS at 3-4; *United States v. Yee*, 129 F.R.D. 629, 635 (N.D. Ohio 1990); *State v. Burgess*, 482 So. 2d 651, 653 (La. Ct. App. 1985); *State v. Cunningham*, 108 N.C. App. 185, 194 (N.C. Ct. App. 1992). The primary reason that these courts have granted this discovery request is that "considerations of fundamental fairness require that the defense have access to material concerning the manner and means of testing so that it can make an independent determination of the tests' reliability and have a fair opportunity to challenge the government's evidence," *Siegfried*, 2000 U.S. Dist. LEXIS at 3-4, as well as effectively challenge the witness during cross examination. Indeed, in this case the defense will receive this predicate scientific material.

The disclosure of the scientific notes and procedures is analogous to the request for the FBI agents' rough notes. Insofar as the agents will be giving testimony based upon the 302's, the rough notes would be crucial to making an independent determination of the accuracy of the agent's final 302, challenging the agent's conclusions in the 302 and

effectively cross examining the agent's testimony. Since, "even the most conscientious agent can err, despite careful training and despite rechecking the report against the notes," *Harrison*, 524 F.2d at 429, in addition to the aforementioned risk of distortion through the overzealousness of the agents, the rough notes are crucial to checking the accuracy of the 302's and challenging the agent's testimony. Therefore, for the exact same reasons that courts allow discovery of underlying procedures and bench notes for expert witnesses, the rough notes of witness interviews need to be produced.

III. The Application of *Brady v. Maryland*

The rough notes sought by the defense must be disclosed under *Brady* and its progeny. While the 11th Circuit has held that the defense must make a preliminary showing of materiality when seeking rough notes pursuant to a *Brady* request, case law is consistent in holding, as with Rule 16 requests, **that there is a lowered standard of materiality that must be met in a pre-trial application.** *United States v. Griffin*, 659 F.2d 932, 939, n.7 (9th Cir. 1981), *cert. denied* 456 U.S. 949 (1982); *United States v. Ramos*, 27 F.3d 65, 71 (3rd Cir. 1994); *see also Liquid Sugars*, 158 F.R.D. at 472-473; *Siegfried*, 2000 U.S. Dist. LEXIS at 4. Furthermore, several Circuit Courts of Appeals have ruled on precisely the issue of whether FBI agents' rough notes should be compelled under *Brady*, and though they required a preliminary showing of materiality, they embraced a lowered standard. Finally, the defense need not demonstrate that all of the rough notes are material to require production or *in camera* review of all of the rough notes. It is simply enough that the prosecution has withheld some "arguably exculpatory evidence," evinced in examples, *infra*, that are simply the "tip of the iceberg" for other, undisclosed, exculpatory material, which justify the trial court in ordering the production,

or to conduct an *in camera* inspection, of all the government's rough notes. *See United States v. Griggs*, 713 F.2d 672, 673-674 (11th Cir. 1983).

The government has conceded that if the rough notes contain *Brady* material, they should be disclosed. Government's Response at 4. However, in a subsequent filing, the government made it abundantly clear that it does not know what is *Brady* material in this case. Sur-Reply of the United States to Defendant's Reply to Government's Response to Motion to Reconsider Trial Date at 4.[4] Although the government is correct in its assessment of 11th Circuit law, in that *Brady* does not allow "mere speculation or allegations" to compel disclosure, once there is even a small showing of materiality, the government has an obligation to disclose the material at least to an *in camera* inspection.

In fact, in one of the very cases the government cites in its motion, *Ramos*, 27 F.3d at 71, the Third Circuit adopted the language and reasoning of *Griffin*, 659 F.2d at 939, n. 7, where the Court opined that, "Unless there is some indication, ***however small***, that the rough notes...met the *Brady* requirement of materiality, we cannot hold dismissal is proper." *Id.* (Emphasis added). Thus, while these courts have required the defendant to show a "colorable claim," *Id.* at 939, of materiality, which can be demonstrated by way of examination of agents or interviewees, or other available documentary evidence, *Id.*; *Ramos*, 27 F.3d at 71, these Courts have intonated that "however small" this showing is, it would suffice. These Courts have recognized the precarious position the defense is in,

[4] In the Sur-Reply of the United States to Defendant's Reply to government's Response to Motion to Reconsider Trial Date, the government states "the United States is not in a position to know what might or what might not be Brady material" and suggests that they need to know the theory of defense before undertaking the challenge of determining what the possible defenses are and comparing those to the material in their possession. Given that the government is unwilling to speculate as to the possible defenses which may be employed, and, of course, the defense is never going to discuss that matter with the government, the appropriate and expedient thing to do is to absolve them from making such determinations which they are, upon their own admission, ill-equipped to make.

namely that we are trying to show that evidence which we have not seen is material, and accordingly have lowered the standard of materiality.

Additionally, it has become a norm across Circuits for the trial court to inspect rough notes *in camera* for *Brady* material. As the Third Circuit stated, "the rough interview notes of the FBI agents should be kept and produced so that the trial court can determine whether the notes should be made available to appellant under *Brady* or the Jencks Act." *United States v. Vella*, 562 F.2d 275, 276 (3rd Cir. 1977), *cert. denied* 434 U.S. 1074 (1978).[5] In several other recent cases, while the Courts of Appeal held that FBI agents' rough notes need not be turned over to the defense, this is only because the trial court in each case conducted an *in camera* inspection of all of the rough notes and found that there were no discrepancies between the rough notes and the 302's, and that the 302's contained ***all*** of the material in the rough notes. *See United States v. Brown*, 303 F.3d 582, 593 (5th Cir. 2002), *cert. denied* 537 U.S. 1173 (2003) ("After conducting *in camera* review of Burton's notes, the district court compared the notes to the 302 in painstaking detail...[and] found that 'the rough notes and the 302 contain no discrepancies that would have aided Brown's defense'"); *United States v. Muhummad*, 120 F.3d 688, 699 (7th Cir. 1997)[6] (where Court found that the defendant was not entitled to the notes because after

[5] Note that the government cites in its brief *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 202 (3rd Cir. 1970), as an authority opposing *in camera* review. government's Response at 9. However, in *Vella* and later in *United States v. Ammar*, 714 F.2d 238, 259 (3rd Cir. 1983), *cert. denied* 464 U.S. 936 (1983), the Third Circuit explicitly held that FBI agents' rough notes and rough drafts of 302's should be disclosed to the trial court for *in camera* review to see if they contain *Brady* or Jencks Act material.

[6] Note that in a later decision, *United States v. Coe*, 220 F.3d 573, 582 (7th Cir. 2000), the Court found that there was not an abuse of discretion when the trial court found minor discrepancies between rough notes and the 302's and still did not order their production. However, this is easily distinguishable from our case because the Court of Appeals was reviewing for reversible error and abuse of discretion, not deciding whether the notes should be produced in the first place.

*in camera* review the district court found that *all* of the contents of the original rough notes were in the 302's).

Moreover, both Supreme Court and other federal court precedent indicate that *in camera* review should be undertaken once the defense has crossed the initial low threshold for pretrial materiality. *See United States v. Agurs*, 427 U.S. at 105 ("Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge"); *Jordan*, 316 F.3d at 1252 ("Not infrequently, what constitutes *Brady* material is fairly debatable.[7] In such cases, the prosecutor should mark the material as a court exhibit and submit to the court for *en camera* inspection"); *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978), *cert. denied* 440 U.S. 986 (1979) ("Requiring materials sought for discovery to be submitted to the court for *in camera* inspection is a practice which is both reasonable and protective of the defendant's rights"); *United States*

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[7] MCLEAN: "In Atlanta...[t]here were a lot of anonymous calls or calls where they said, you know, my boyfriend did it."

JAFFE: "It's classic *Brady*. Even if it's not credible, who makes that decision."

MCLEAN: "Well, again, your calling something *Brady* that's not necessarily *Brady*. The defense theory is: Everything is *Brady*. ***The government's theory is nothing is Brady***." (Emphasis added).
Court Conference, July 30, 2003, pp. 9-10.

CLARKE: "[W]e would think that the negatives (referring to negative scientific test results) would be *Brady*.

MCLEAN: "Well, I'm not sure that it is Brady. Again, your interpretation of Brady and ours is somewhat different."
Court Conference, March 31, 2004, p. 22.

JAFFE: "Very often, in those rough notes, there are differences. There's impeaching differences under *Giglio* and *Kyles*. There may be *Brady*. I understand the government has already reviewed those. But again, without them understanding our theories of defense, I'm not sure that that review would be all that meaningful. And, also, as we've said several times in here, the government's view of Brady and our view of *Brady* is quite often different."
Court Conference, April 26, 2004, p. 7.

*v. Trevino*, 89 F.3d 187, 190 (4th Cir. 1996) (In regards to confidential information, "Once the accused has made a plausible showing that the evidence would be both material and favorable, the trial court must review the information *in camera* to ascertain its true nature and determine whether it must be disclosed").[8]

In *United States v. Griggs*, 713 F.2d 672 (11th Cir. 1983), the 11th Circuit was presented with a case in which the prosecutor denied knowledge of any exculpatory evidence; however, during cross examination the defendant evoked "arguably exculpatory evidence" from a government witness. *Id.* at 673. In ordering the trial court to conduct an *in camera* review of all of the government's evidence, the 11th Circuit stated, "Although appellants have pointed to no specific exculpatory evidence that may have been suppressed, there is some merit to the contention that, if the arguably exculpatory statements of witnesses discussed *supra* were in a prosecutor's file and not produced, failure to disclose indicates the 'tip of an iceberg' of evidence that should have been revealed under *Brady*. It would have been appropriate for the trial court to conduct an *in camera* review of the files to detect any such suppression." *Id.* at 674; *see also Anderson v. United States*, 788 F.2d 517, 518-519 (8th Cir. 1986) (where the government refused to turn over tapes of conversations and a polygraph examination of a key government witness claiming that the tapes were too voluminous and unrelated, and the Court of Appeals found error, stating, "Whether the statements were material to Anderson's guilt or punishment is a question that the district court should have determined by reviewing the tapes and the polygraph statements *in camera*"). Thus,

[8] Note that the government cites to the antiquated *United States v. Harris*, 409 F.2d 77 (4th Cir. 1969), to support its proposition that *Brady* does not require *in camera* review. Since 1969, as shown by the cases supra, many Courts have required *in camera* inspection and *Trevino* shows the 4th Circuit does not even follow this precedent anymore.

because the defense has made a preliminary materiality showing, *infra*, that there is some suppression of "arguably exculpatory evidence" by the government with respect to some of the rough notes, the Court should undertake an *in camera* inspection of all the rough notes, as the instances indicate the tip of the iceberg of other exculpatory or impeachment evidence.[9] It would be a difficult and time consuming task for the defense to interview every single witness that the FBI interviewed to determine if there is an indication of discrepancies between every rough note and every 302, and such an undertaking could extend the time for which the defense could reasonably be ready for trial. [10]

As previously stated, there is a lower standard of materiality in pretrial applications for rough notes, specifically in regards to rough notes as *Brady* material, and even cases that the government cite to have recognized that the showing of materiality need only be small. Further, since we have made a showing, *infra*, that these reports contain exculpatory or impeachment material that the government has not disclosed, these instances evince the "tip of the iceberg" of other evidence in these notes that the government has not disclosed, as the *Griggs* Court held. At a minimum, the showing

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[9] In addition, the defense has discovered that the government is aware, or should be aware, of obviously exculpatory material which has not been turned over to the defense. One of the experts the government has stated its intention to use is E.B. In *United States v. Gonzalez*, 1996 WL 328601 (D.Del. 1996), dealing with the media's right of access to certain documents turned over to the defense post trial after E.B. had testified:

"The general contents of the documents were made known to the News Journal by the criminal defendant's unsealed motion for a new trial. Subsequent to the defendant's conviction, the prosecution gave certain documents of which it had just come into possession, containing allegations of past wrongdoing, misconduct, and possible evidence contamination by (E.B.), who had testified as an expert witness for the government. The sealed documents included, *inter alia,* allegations of (E.B.'s) failure, while an explosives examiner at the Federal Bureau of Investigations ("FBI"), to follow FBI Materials Analysis Protocols in examining trace materials found on explosive fragments and residue, E.B's maintenance of a dirty and possibly contaminated work environment, (E.B's) failure to sterilize laboratory glassware, and general allegations of professional incompetence."

[10] The defense acknowledges that in most cases the process of handling rough notes is to utilize the Court as a conduit. However, given the enormity of the task that the Court would have to undertake to fairly review each and every rough note in this case, which number in the tens of thousands, and given the burden that the defense would be under to fully communicate with the Court so that its review would be meaningful, it is simply more practical to order the disclosure of all rough notes to the defense.

made by the defendant is sufficient to meet the standard of materiality to require an *in camera* inspection.

## IV. The Defendant's Showing of Materiality[11]

The following paragraphs refer to a number of illustrations justifying the disclosure of the rough notes. The defense has received hundreds of thousands of documents contained on roughly forty-five (45) compact disks. The defense has not had the opportunity to review all of these documents for the purpose of trial preparation and has reviewed even less for the purpose of this motion.[12] However, the defense has reviewed enough, and investigated enough, to realize that the rough notes are discoverable under the standards discussed, *supra*. The illustrations are as follows:

a) One of the anticipated issues at trial will be how, consistent with the government's theory that Eric Rudolph acted alone, Eric Rudolph parked his truck some two miles from the area of the clinic and walked down to the clinic along busy thoroughfares, without anybody seeing him. The only witness disclosed to date who saw anybody walking in the area between where the truck was parked and the clinic is J.G. In BH-AM-003896 J.G. says that he/she saw a person, at 7:10 AM on January 29, 1998, wearing dark pants, a dark coat and a dark hat walking north, towards downtown, bound

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[11] The defendant's showing of materiality references a number of Bates stamped documents provided by the government. There are also references to interviews conducted by the defense. These documents are not attached as an exhibit hereto due to the Defendant's concerns regarding the application of the Protective Order and the Defendant's interest in maintaining the confidentiality of his work-product, respectively. In signing this filing counsel for the defendant verifies that what is alleged to be contained in the documents referenced, *infra*, is accurate. However, should the Court or the government request that these documents be made available for the Court's review in making determinations with respect to the merits of this motion they will be provided.

[12] Because a full and complete record would be necessary for any appellate review of this motion, should this Honorable Court choose to deny access to all of the rough notes in this case, the defense reserves the right to supplement the record with a copy of all of the discovery received to date and also reserves the right to move that all of the roughs notes be sealed and made a part of the record.

on the east side of Montgomery Hwy in the area of Aldridge's Garden Shop[13] and McDonald's. However, in BH-302-001715 J.G. states that he/she saw this person walking south, towards Homewood and in the opposite direction of the clinic, on 20th Street South.

Given that the government may rely upon this person as a witness at trial, it is material to the defense to know whether J.G. made two inconsistent statements with respect to the direction of travel of the person or whether the agents made a mistake in reporting what J.G. had to say. Under one circumstance the error is the witness', and is impeachment material, and in the other circumstance the error could be impeachment material as to the agent who made the error.

b) In many circumstances the statements the government has provided are incomplete. According to the statements in Bates stamped documents BH-302-008155, BH-302-000665, BH-AM-003550, BH-AM-005016, BH-AM-005752, BH-RS-000738 and BH-RS-001171, E.A. was on the top floor of the Medical Towers Building. Just after the explosion, E.A. saw a white male running from the direction of the clinic and behind a building next door to the clinic. E.A. describes this white male as having had on a dark jacket and a ski cap.

However, in statements to the defense this same witness has indicated that E.A. also saw a white truck leave the area near where this white male was observed. Of note, one of the suspects that the government investigated, J.D., drove a white Chevrolet truck at the time of the bombing. J.D. is a known abortion protester who lived within a block of the clinic, who also had bomb making manuals, including instructions on remote detonated bombs, as well as an "Army of God" manual in his/her possession, and was

[13] This location is now occupied by Walgreen's Drug Store.

even known to have watched numerous videos regarding other bombings prior to January 29, 1998,. It is crucial for the defense to know if E.A. told law enforcement about this truck, or if they asked. If this information is contained in the rough notes, it is exculpatory, and, if it is not, it is impeachment.

c) One of the initial investigative efforts that law enforcement undertook after the government identified Eric Rudolph as a potential suspect was to determine whether western North Carolina resident, and purported Eric Rudolph associate, T.B., had been to Birmingham prior to the date of the bombing. Clearly, if the government could establish T.B.'s presence in Birmingham, it would buttress the government's completely circumstantial case against Eric Rudolph. The government produced to the defendant Bates stamped document numbered BH-302-001787, a FD-302[14] drafted by Special Agent D.S. of the BATF and Special Agent W.F. of the FBI, which purports to reflect the substance of an February 1998 interview with Birmingham Police Officer D.H. Officer D.H. worked an off duty job at the clinic in 1998. On page 3 and 4 of BH-302-001787, there is a discussion between the agents and Officer D.H. of an unknown suspicious person being present at a clinic protest on January 17, 1998. Officer D.H. states that he/she saw this person arrive with other protesters and leave with other protesters. On page 5 of BH-302-001787, Officer D.H. states that Officer T.G. of the Birmingham Police Department showed him/her two photographs while they were both present for Officer Robert Sanderson's wake. Officer D.H. also indicates to the agents

[14] Throughout the defendant's showing of materiality there are references to "FD-302's." However, the Bates stamped documents referenced herein are not all technically FD-302's. There are also "Rapid-Start" sheets, "lead sheets" and others which also contain summaries of witness statements. For the convenience of the reader, and due to the fact that the differences between the nomenclature of the BATF and FBI are not material to the motion and do not effect the nature of the documents, the defense has not made this distinction in each reference, but rather refers to all documents provided by the government as FD-302's.

that one of the pictures was of Eric Rudolph, whom Officer D.H. indicated he/she did not recognize. Officer D.H. states that Officer T.G. also "showed [him/her] a photo of another person." Officer D.H. says that the person in the picture Officer T.G. showed him is the same person that Officer D.H. had seen on January 17, 1998.

The agents then contacted Officer T.G. and asked him/her to join the interview. Officer T.G. arrives at the place of the interview with the same photo Officer T.G. has previously shown to Officer D.H.. The agents conducting the interview recognize that the person depicted in the picture as T.B.. Officer D.H. identifies the person depicted in this picture as being the suspicious person who was at the clinic protest on January 17, 1998, twelve days prior to the bombing. Officer D.H. goes into great detail as to this person's description and Officer D.H. further states that he/she pointed this person out to a clinic worker on January 17, 1998.

The government also provided the defense a document Bates stamped numbered BH-302-045634. This document reflects a statement of Officer D.H. taken in May 2002, over four years after D.H.'s first statement. In this statement, Officer D.H. states that in 1998 he/she was shown a picture of a "crowd" of people and that he/she simply picked out one who looked familiar to him. Officer D.H. says that he/she was then told that the person he/she picked was T.B.. Finally, Officer D.H. says that he/she was on administrative leave on January 17, 1998, due to a shooting incident and was, therefore, not at the clinic on that date.

Several significant conclusions can be drawn from these documents all of which support the defendant's motion. First, it is clear that if federal law enforcement did not have a policy of refusing to record witness interviews, there would be no confusion as to

what Officer D.H. said or what he/she meant. Another conclusion that can be drawn is that Officer D.H. did not say what is reflected in the FD-302 and through inadvertence, i.e., the agents relied on their memory rather than on their notes; the agents simply put incorrect information in the document. If an error of this significance could occur in such an important interview, similar undiscovered errors, in all likelihood, exist in hundreds or thousands of other documents.[15]

These circumstances call into question the validity and value of the discovery received to date and it underscores the importance of having the rough notes, so that the defense has as an accurate, or as close to accurate as possible, rendition of what a witness told the agents without the interference of faulty memories. Under such circumstances the rough notes would be more material than the FD-302. Further, if the government has provided the defense with documents in which witnesses are purported to have said "X", and, in fact, the witness says that he or she said "Y", the defense has relied upon information in making decisions about investigation and trial preparation based upon substantially flawed information. Further, it is equally possible that law enforcement decisions were made after relying upon substantially flawed information.

Moreover, if the agents who interviewed Officer D.H. intentionally misrepresented what he/she had to say, the rough notes could serve as valuable *Brady* and *Giglio* information as the notes could demonstrate federal law enforcement's willingness to mischaracterize evidence to advance its theories of guilt.

Another conclusion that could be drawn is that Officer D.H. may not have been truthful during his/her interviews. The statements of Officer D.H., if they are accurately

[15] A defendant has a right to present theories of defense without undue restriction. See *Chambers v. Mississippi*, 410, U.S. 284, 294-304 (1973). One defense that can be employed in any circumstantial case, is questioning the quality of an investigation and thus its conclusions.

reflected in these 302's, cannot be fairly considered to be at all consistent, and, therefore, any rough notes of these interviews are *Giglio* material.

Finally, the defense is entitled to the rough notes due to the fact that the defense ought to be privy to why this second interview was conducted after the passing of four years. The rough notes may contain some material information as to why this subsequent interview was conducted. The potential impeachment value and exculpatory nature, in terms of bias, of this information requires that these notes either be turned over to the defense or reviewed *in camera* by the court.

d) At trial, the government will undoubtedly attempt to show that Eric Rudolph was present in Birmingham at various times prior to the bombing in an attempt to prove that Eric Rudolph had the opportunity to commit the crime with which he is charged. One of the witnesses the government may rely upon to prove this connection is P.C.. Bates stamped documents BH-AM-003120, BH-302-001718 and BH-RS-000326 reflect that on January 28, 1998, at 9 PM to 9:30 PM, witness P.C. was walking his/her dog and passed a blue or "bluish" colored truck parked but still running near the intersection of 15th Street and 16th Avenue. This vehicle was occupied by at least one white male who appeared to have on a wig due to the fact that the hair was long and shiny. In one of the documents, BH-AM-3120, P.C. is reported to have said specifically that this person's hair was not shoulder-length. In another document, BH-302-0017181, P.C. is purported to have said specifically that the hair was shoulder-length. P.C. also describes the person as a "younger age" and not "old age." As P.C. walked back past the truck on his/her way home, he/she saw the same truck still parked and still running. The person in the truck did not look right or left which P.C. felt was unusual.

Given that the government may rely upon this person as a witness at trial, it is material to the defense to know whether P.C. made two inconsistent statements with respect to the description of the person in the truck or whether the agents made a mistake in reporting what he/she had to say. Under one circumstance, the error is the witness' and is impeachment material and in the other circumstance the error could be impeachment material as to the agent who made the error. This error could impeach the quality of the government's investigation.

e) One of the most glaring weaknesses in the government's case is the fact that they have no direct evidence that Eric Rudolph placed the explosive device at the clinic. Further, it is clear from the wording of the indictment that it is the government's theory that Eric Rudolph acted alone. In addition, it is the government's position that the perpetrator dug a fairly deep hole into fairly rocky ground at the site of the bombing in clear view on the corner of a busy intersection and then placed the bomb in the hole. (The purpose of this hole would be to directionalize the shrapnel from the bomb toward the clinic.)

While there is no direct evidence suggesting that Eric Rudolph performed any of these actions, there are 302's which suggest that three other people were at the clinic acting suspiciously at 11:30 PM on January 28, 1998, the night prior to the bombing. J.M., as reflected in documents Bates stamped numbered BH-302-000385, BH-AM-004259 and BH-RS-000155 was walking down 10th Avenue, one-half block away from the clinic, when J.M. observed a gray, early to mid 90's, Nissan Maxima.[16] This vehicle was parked in front of the New Woman/All Women Health Care Clinic and J.M observed

[16] Bates stamped document AT-EC-000716 indicates that a person was seen entering a dark colored Nissan Maxima, with a possible Jefferson County, AL tag, shortly after the July 27, 1996 bombing at Centennial Olympic Park.

two white males walk from the area of the clinic and get into the Nissan. As J.M. got closer to the Nissan, a third white male came from the area of the clinic and bumped into J.M. This third white male got into the Nissan as well. This person did not say anything when they bumped into each other. J.M. said "what's the deal" but received no reply.

J.M. described this third person as 5'8", medium to heavy build, short hair with possibly a red tint, wearing a dark toboggan hat, a brown nylon windbreaker and blue jeans. This description is inconsistent with Eric Rudolph. Bates stamped document BH-RS-000155 indicates that J.M. came to the crime scene to give this information to law enforcement.

This information alone, in conjunction with the statement of J.A., Bates stamped number document BH-302-029739, who saw a gray Nissan or Toyota two door parked at 11th and 19th between 6 AM and 6:30 AM, clearly demonstrate that the statements by J.M. are exculpatory. Therefore, any document relating thereto, whether rough notes or otherwise, reflect that someone else could have been responsible for placing the bomb and is discoverable and production is required. Moreover, the exculpatory nature of the information, and the lack of production from the government, demonstrates the government's inability to recognize clearly exculpatory evidence.

f) Eric Rudolph has stated that he is not guilty of the charges against him; therefore, one of the most obvious and important efforts the defense is making is gathering and investigating any information that some other person or persons is responsible for the offense. There are a number of indications in the documents, in addition to J.M.'s statement, suggesting that suspicious individuals were in the area of the clinic with an opportunity to plant the device in this case.

Among them are BH-302-000251 and BH-AM-003006, which reflect interviews of G.S. who states that between 6:55 AM and 7:00 AM G.S. saw a man get into a light-colored American made car, possibly a Chevy Impala. This vehicle was parked directly in front of the New Woman/All Women Clinic. The person who got into the car shook the steering wheel violently and then drove off. G.S. describes this person as a white male, over 5'10", middle-aged, blondish brown, matted, clumpy, "wild", hair to bottom of neck, clean shaven, no glasses, light colored long pants, possibly blue jeans.

Witness, W.M., as reflected in BH-302-000221, states that G.S. was interviewed for two hours on Feb. 1st, 1998. The statements we have received could not reflect two hours of conversation. Bates stamped document BH-302-000251 is the longer of the two documents and is only two pages. Even giving law enforcement the benefit of the doubt, this document reflects no more than a fifteen to twenty minute conversation. Given that the substance of G.S.'s statement is exculpatory and given that law enforcement found it appropriate to interview him for two hours, the rough notes surely contain crucial exculpatory information.

g) The government's theory, as best as can be determined from the affidavits for arrest and search warrants, is that the person who the government suspects was responsible for the bombing was in Rast Park walking in a southwesterly direction towards the intersection of 16th Street and 11th Avenue shortly after the bombing. According, to the government's theory, J.H., and only J.H.,[17] saw this person. However,

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[17] Bates stamped document BH-AM-003221 reflects that it was law enforcements' intention to interview all 409 students who lived at Rast Hall at the time of the bombing. Bates stamped document BH-RS-000418 indicates that this lead was covered "w/o positive results."

J.H. was a resident of Rast Hall on January 29, 1998 and was in the Rast Hall laundry room when he indicates he first saw the individual he followed. Interestingly enough, however, when one searches ALL of the documents we have been provided with our search engine, using the terms "Rast Hall," there

other people were in that area. One example is D.V., Bates stamped documents BH-302-37207 and BH-RS-001288, who was driving east on 11th Ave at 17th Street South when he/she heard the explosion. D.V. made a u-turn in a parking lot and then drove west on 11th to 16th Street where he/she then turned right onto 16th Street. While D.V. did observe a white male walking through an alley behind the Barber School near the corner of 10th Avenue and 16th Street, D.V. did not indicate that he/she saw anybody at the intersection of 16th Street and 11th Avenue. As far as can be determined, law enforcement did not ask D.V. about anybody walking through the park or standing or crossing at the intersection of 16th Street and 11th Avenue

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are only fifty-four (54) "hits" and only two of these "hits" reference actual witness interviews of residents of Rast Hall other than J.H. These witnesses are B.E.W. and J.M.H., both of whom impeach J.H.

B.E.W., in Bates stamped documents BH-302-037937 and BH-RS-000544, indicates that he/she was in his/her dorm room at Rast Hall when the bomb went off. He/she saw a woman in a green dress or scrubs get into a Ford Bronco or other similar SUV in the alley behind the Domino's and drive west to 16th Street turn north and then west on 10th. He/she believes that this person got into the passenger side of the vehicle. J.H. reports no such vehicle. J.M.H. in Bates stamped documents BH-302-037658, BH-AM-003264 and BH-RS-000467 indicates that he/she heard the explosion and then tires screeching from his Rast Hall dorm room and that he/she immediately looked out the window toward the clinic. He did not see any vehicles or pedestrians leaving the area. J.M.H. was utilizing his/her binoculars when he/she made these observations. If either of these student's accounts are accurate and truthful, J.H.'s account of the events is called into question. Further, it is likely that if any of the remaining 406 residents of Rast Hall had been interviewed, their accounts would be more similar to B.E.W.'s and J.E.H.'s than J.H.'s account.

In contrast addition, if one searches "Camp Hall" in the same database there are 251 "hits" referencing a much greater number of witness interviews with Camp Hall residents. Granted many of these Camp Hall residents have very little to say. However, it seems unreasonable to expect that the investigation would concentrate a greater effort on Camp Hall when that dormitory is situated with much less of a view of the area in which the "alleged suspect" was spotted by J.H. A map of this portion of the campus can be located at: http://www.uab.edu/Campus_map/campus_map_names.html .
In addition, J.H. indicates that J.H. saw the "suspect" he eventually followed cross the street at the intersection of 11th Avenue and 16th Street. A search of the database with all of the documents provided by the government reveals that nobody else seems to have seen this "suspect" or have been in this area at the time J.H. sees the "suspect." This is despite the fact that there were literally hundreds of people within a block of the clinic, located at the corner of 10th Avenue and 17th Street, at the time of the explosion. The only person J.H. states was in the area with him/her during his/her observations is discounted by J.H.'s speculation that she did not see the "suspect."

The striking absence of this pertinent information raises significant questions regarding the quality of the investigatory interview goals and/or techniques and raise potential issues of bias as well. Either the agent who conducted the interview apparently did an incomplete interview, an error the type of which, cumulatively with other errors, could undermine the conclusions of the investigation. Alternatively, D.V. may have stated that he/she did not see anybody in the park or at the intersection and the information simply never made it into the documents. Under either of these scenarios, the defense would be entitled to the rough notes as both impeachment and exculpatory information, respectively. That the defense does not know which scenario is true cannot be said to convert the defense's argument into mere speculation. The defense simply cannot know what it does not know.

h) As previously stated, the government's theory is that the person who the government suspects was responsible for the bombing was in Rast Park walking in a southwesterly direction towards the intersection of 16th Street and 11th Avenue shortly after the bombing. Clearly, it would be important for the defense to demonstrate that multiple people were seen leaving the scene of the bombing who do not fit Eric Rudolph's description nor do they fit the description given by J.H. of the person he/she alleges to have seen in Rast Park. Bates stamped documents numbered BH-302-001388 and BH-RS-000479 reflect an interview concerning S.M. occurring on February 4, 1998.

S.M., who works one half of a block from the clinic at Hubbard Properties, states that he/she went to the scene just after the explosion and saw a young white male under 30, wearing a blue sweatshirt, blue jeans and medium length brown hair leaving the scene through the Domino's Pizza parking lot. Bates stamped document numbers BH-302-

009490 and BH-AM-5897 reflect interviews with S.M. on February 27, 1998, where S.M. again says that he/she saw somebody leaving the scene and S.M. says he/she saw someone running north on 17th Street within a minute of the explosion. S.M. describes this person as a white male wearing blue jeans and a short sleeved blue shirt and had medium length curly brown hair. However, in Bates numbered document BH-302-015000, an interview on February 9, 1998, S.M. is said to have indicated that he/she did not see any "individuals leaving the scene that would have been suspicious."

The same type of inconsistency occurs with W.S. a co-worker of S.M.'s. Bates stamped documents BH-302-009482 and BH-AM-005899 are statements taken on March 2, 1998, in which W.S. says that immediately after the blast he/she saw two white males leaving the area of the bombing. One ran North on 17th and then west through the Domino's lot. The other white male ran south on 17th Street. However, in Bates numbered document BH-AM-003280, W.S. is purported to have said that he/she did not see anybody leaving the scene. In addition, BH-RS-000612 indicates that S.M. and W.S. were interviewed and that they saw nothing.

C.G., who is a co-worker of both S.M. and W.S. at Hubbard Properties, is interviewed in Bates numbered documents BH-302-009889, BH-AM-005883 and BH-RS-001325, C.G. stated that he/she heard the explosion and saw S.M. and W.S. run toward the scene. C.G. stated that within thirty (30) seconds of the explosion C.G. saw a tall, thin white male wearing a green army raincoat and a sailor's hat. This person had blond to light brown hair which came down to his shoulders. When C.G. first saw this person, he was coming out of the woods south of Domino's Pizza but north of the dentist's office which is located on 17th Street midway between 10th and 11th Avenue.

This man ran north while looking at the blast site towards Domino's, then west in front of Domino's, and finally out of site. This person would be going in a totally different direction than the person allegedly seen by J.H.

Clearly, it appears that these three witnesses saw at least one person leaving the scene of the bombing. Further, the person or persons seen by these witnesses impeach, not only the government's theory but its main witness, J.H., whose description of the person J.H. allegedly saw is far different than the description given by these witnesses.

i) J.H., the government's main witness who was relied upon in applications for arrest and search warrants, and in gaining the indictment itself, is interviewed a number of times, the results of which are in the following Bates stamped numbered documents: BH-302-017174, BH-302-005574, BH-302-000653, BH-302-001223, BH-302-000095, BH-EC-035059, BH-SUS-000141, BH-RS-000093, BH-RS-000094, BH-1B-001238, BH-RS-000054, BH-AM-004550, BH-AM-002952, BH-302-22766 and BH-302-022764. J.H.'s statements are remarkable, not only in their numbers, but in the number of inconsistencies and discrepancies. Discovery of the rough notes is necessary for the defense to have a global view of the extent of these inconsistencies.

To illustrate the issue, according to J.H., he/she heard the explosion and looked out the window of the laundry room whereupon he/she saw, immediately, or within seconds, an individual walking away from the immediate area at a quick pace. J.H. went outside and was looking toward the area of the explosion. (In BH-RS-000158 and BH-AM-002933 J.H.' described the person as "calmly" walking through the park.) J.H. was standing with a girl, but J.H. does not think she saw the person J.H. saw. (BH-302-005574, p. 24) This person is described as a white male with long, shoulder length,

brown hair, 6'1", "not medium height", (BH-302-005574 p. 4) 175 to 185 lbs., "not stout looking", (BH-302-005574 p. 4) wearing a black hat, unknown type and color of jacket, perhaps a longer coat, dark pants and an empty black backpack. J.H. later decides that the coat was brown in BH-302-000653, at p. 3.

J.H. states that this person walked south through Rast Park and continued south on 16th Street. J.H. went to his/her vehicle. During this time the person J.H. claims to have seen in the Rast Park was out of his/her sight for any number of minutes. J.H. drove south on 16th Street and then saw a person who then turned west onto 14th Alley South where this person pulled something out of his pocket. J.H. thinks, but did not see, that it was a blue plastic bag. In addition, Agent W.F. tells J.H. it was a bag, BH-302-005574, at p. 26. J.H. says he/she continued to 15th Ave where J.H. turned left and waited on 15th Ave between 16th and 17th Street. "Moments later," J.H. saw another person walking east on 15th Avenue toward 17th Street on the North side of the street. The determination that it is the same person is based on the person carrying a blue plastic bag. BH-302-05574, p. 7, 8. According to J.H., this person, BH-302-05574, at p. 8, had "either brown or blackish hair" that appeared pressed down, and "whatever the hair was it wasn't on him anymore." In BH-302-005574, at p. 8 Det. J.B. tells, ***yes tells***, J.H. that the person previously had a wig on.

All of this means, of course, that the person would have had to stuff a "long" coat, a wig and a cap into a blue plastic bag which previously fit into a fist. This new person then walks east to 18th Street South where the person turned North and then east on 15th Ave where J.H. lost sight of the person. In BH-302-000653 p. 3, **J.H. says that he/she pretends his/her car broke down at 17th Street allowing the person to pass and get**

**ahead of J.H. so he could get a better look at the person he was following. In the "911" tape BH-302-000095, p. 3 J.H. affirmatively says that J.H.'s car broke down.**

At 7:54 AM, J.H. makes a "911" phone call from the McDonald's. While J.H. is on the phone he/she observes another person across the street from the McDonald's. J.H. says the person had a **white shirt** on and is not sure if this person had glasses on, BH-302-005574, at p. 16. In BH-302-000653, at p. 4, the person is wearing a **light colored** shirt with a dark long-sleeve shirt underneath. The person has a book bag which is described as being "puffed up" and the person does not have the blue plastic bag. The conclusion that it is the same person is based on the book bag being full rather than empty, BH-302-005574, p. 30. J.H. does not know if this third person is dressed the same as the person J.H. saw on 15th Avenue, BH-302-005574, at p. 30. **Ironically, J.H. says that the height and weight of the various people J.H. saw "were *about* the same,"** BH-302-5574, p. 31. After making the "911" call, J.H. gets in his/her car and travels west on Valley Avenue when J.H. sees a gray truck traveling in the opposite (east) direction, BH-302-005574 at p. 21 and 18. As J.H. drives by, he/she sees that the person in the gray truck had a black or blue shirt under another shirt, making J.H. think this now second, third, fourth or fifth person was the same person, but he/she is unsure. (BH-302-005574, p. 19) J.H. does note that the person in the gray truck had a mustache which J.H. had never noticed on either of the previous people, BH-302-005574, p. 20.

J.H. is a very important lay witness in this case. Given that J.H.'s pre-trial statements are full of inconsistencies and discrepancies, it is very likely that the rough notes with reference to these statements will contain additional inconsistencies and

discrepancies.[18] The defense is entitled to the impeachment information which will be contained in the actual notes in order to conduct a meaningful cross-examination. Such an examination will not be possible with only the FD-302.

j) Some of the discovery received from the government is simply useless without the rough notes. For example E.H.'s statement, Bates stamped number BH-302-012602, is an exact duplicate of P.S.'s statement, Bates stamped BH-302-012604. The only difference between the documents are the names.

k) One of the factual issues at trial will revolve around circumstances at the McDonald's on Montgomery Highway. and, as is often the case, the details are the most important issue. With respect to some of these important witnesses, no details are forthcoming in the initial interview, but then seem to appear once the interviews are done without the tape recorders. One witness, B.W., a worker at McDonald's, as reflected in interviews Bates stamped numbered BH-302-000059, BH-302-001435 and BH-AM-003163, says that J.H. arrived at McDonald's at 8:30 to 9:00 AM and was hysterical. B.W. says that he/she heard J.H. say that he/she had "seen a man burn down a building downtown" and that J.H. had "seen a man blow up a building down by UAB near the Ronald McDonald House." B.W. says that J.H. said that he/she saw the person take off a wig and sunglasses and place them in a book bag and described the person as wearing a flannel shirt and a ball cap. B.W. says that while on the phone J.H. started to jump up and down saying "here he comes, here he comes." B.W. then sees the white male J.H. was referring to and indicates that B.W. saw him walking "calmly" down the hill in front

[18] In addition, it is made clear in Bates stamped document BH-302-005574 (recorded interview of J.H. on January 29, 1998 at 10:24 A.M) that an off-tape discussion was had between J.H. and Det. J.B. prior to the tape recorder being turned on. Page 1 of the transcript reflects the following:
Det. J.B.: "(J.H.), this morning, uh, I've already spoke with you, uh, can you tell me where you were and what you witnessed this morning?"

of McDonald's. B.W. describes the person he/she saw as a white male, 5'8" to 5'9", slender, in his late 20's to early 30's, with brown hair, curled up at the collar, and a rough beard, as if the person had not shaved in a couple of days, carrying a dark blue book bag which appeared to be full, wearing tinted prescription glasses and a "nasty" baseball cap. B.W. further describes this person as having shoulder-length, light brown curly hair and wearing a flannel plaid shirt, dark shoes and dark pants. B.W. says that he/she would recognize this person if he/she saw him again.

However, prior to giving all of these details, B.W. was interviewed initially on January 29, 1998 at 10:01 AM. This occurred roughly two hours after the events B.W. was being asked to describe. In this taped statement, Bates stamped number BH-302-000830, to Officer B.L., B.W. is uncertain as to almost every detail. B.W. says that "all I saw was his (blue) book bag" and that he had a hat of an unknown color. B.W. says the person's hair was shoulder-length and curly and describes the person as being 5'8" to 5'9" "slim" and his weight as being 180 to 190. B.W. could not describe the pants at all and "couldn't say" whether the person had any facial hair. Finally, B.W. saw that the person had glasses but he/she does not know whether they were "shades" or prescription.

Obviously, B.W. is an important witness and it is unclear why his/her statements are so drastically different. Because the statements are so drastically different, the rough notes probably contain additional impeachment material over and above what is contained in the documents received so far.

l) One of the witnesses the defense expects the government to rely upon is M.B., interviews reflected in Bates stamped document numbers BH-302-000663, BH-SUS-000313, BH-EC-043807, and BH-AM-003365. M.B. states that at 9:40 AM on the

morning of the bombing M.B. was entering I-59 north at the Trussville, AL exit, which would lie between Birmingham and North Carolina. M.B. states that as she tried to merge, a gray pick up truck M.B. observed, would not let him/her merge into the right lane. In the initial interview on February 5, 1998, M.B. could not recall any descriptive data regarding the driver other than the person was a while male. Subsequently, M.B. was shown, and identified, a picture of Eric Rudolph as being the person driving the truck in question. The rough notes of the initial interview likely indicate additional uncertainty which would impeach any in-court identification. The defense needs the rough notes to adequately examine M.B. and explore the circumstances of the witness' initial statement.

m) Some of the documents provided by the government are missing vital information and without such information the documents are useless. For example, in Bates numbered documents BH-302-012604, BH-AM-003733 and BH-RS-000827, P.S. says that he/she saw a White Dodge truck being driven by a suspicious white male who made a sudden U-Turn on 19th Street South after being parked on 19th and 10th Avenue (two blocks from the clinic) and then turn into an alley on the 1800 block of 10th Avenue South and drive west bound (one block away from and towards the clinic). The driver is described as a white male, brown or black hair, brown eyes, early to mid-twenties, with blue or black shirt on. This could be valuable information to the defense showing other suspicious individuals who may have committed the offense. However, no time is noted on these documents.

n) As previously stated, the government will likely try to prove that Eric Rudolph was in Birmingham on one or more occasions prior to the bombing, The government may try to do this with witnesses who saw a truck similar to the one owned by Eric

Rudolph. In Bates stamped numbered document BH-RS-001017, R.L. says that he/she saw a truck matching the description of Rudolph's illegally parked 2 to 2.5 weeks before the bombing at the corner of 10th Avenue and 18th Street. R.L. goes on to state that he/she has not seen the truck since the bombing. However, the document does not indicate whether he/she saw the truck on one day two weeks before the bombing or whether it was parked there every day for two straight weeks. Hopefully, the agent who took the statement took adequate notes so as to clarify this issue.

o) M.S. (referenced in Bates stamped documents BH-IN-000356 and BH-AM-003250) supervisor at Vulcan Park, heard the explosion and went outside with co-worker C.T. to see from where the explosion came. The documents indicate that M.S. did not see anything and went inside. C.T. then *told* M.S. that he/she saw an individual walking from the woods and towards the highway. In Bates stamped documents BH-RS-000260, BH-AM-003039, BH-RS-000283, BH-302-000089, BH-302-003387, BH-302-003387, BH-EC-035969, BH-302-004490 and BH-302-000089, C.T. indicates that he/she was working at the Vulcan Park when he/she heard the explosion and that within one and a half minutes to four minutes C.T. saw a man walking up the side of the mountain and then down Montgomery Highway. This person was wearing a black jacket, a black hat, and a backpack and was 5'8" 160 to 170 lbs. According to Bates stamped document BH-302-006273, Tinsley, along with five other employees of Vulcan Park, is shown a picture of Eric Rudolph. None of the employees could make an identification.

The defense has spoken with M.S. Interestingly enough he/she has indicated to a defense investigator and a member of the defense team that not only did M.S. see the

person walk out of the woods, but M.S. told investigators at the time of his/her interviews that he/she had seen this person. M.S. has signed a statement to this effect.

Significant inferences can be drawn from these documents, all of which support the defendant's motion. If federal law enforcement did not refuse to tape record witness interviews, we would know what M.S. said and what M.S. meant. Also, it is possible that M.S. did not say what is reflected in the documents provided by the government and through inadvertence the agents simply put the wrong information in the document. If an errors of this type can occur in an important interview, similar, yet undiscovered, errors likely exist in the other documents as well. These inferences raise questions as to the validity and the value of the discovery received and it underscores the importance of having the rough notes which would, hopefully, give the defense an accurate rendition of what the witness told the agents, without the interference of human error. Further, it appears that the government has provided the defense with documents in which witnesses are purported to have said one thing, and in reality the witness said something else. Where that occurs, the defense is relying upon information in making decisions about investigation and trial preparation based on incorrect information, and may be doing so on innumerable occasions.

Also, if the agents who interviewed M.S. intentionally misrepresented what he/she said, the rough notes could serve as valuable *Brady* and *Giglio* information, as the notes could demonstrate federal law enforcement's eagerness to falsify evidence to gain an advantage in this litigation.

## V. Conclusion

The argument, controlling precedent and illustrations included *supra* justify the disclosure to the defense, or in the alternative an *in camera* review of, all of the rough notes in this case. Further, given the nature of this case and the burden it would put on both this Honorable Court and the defense to conduct a fair and meaningful review of all of the rough notes, the far more practical and fair approach would be for the Court to order all of the rough notes to be disclosed to the defense.

WHEREFORE, PREMISES CONSIDERED, the defendant moves, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Federal Rules of Criminal Procedure, that the government be required to produce, or in the alternative, that the Court examine *in camera*, all rough notes which exist in this case. Further, the defendant requests that an evidentiary hearing be held on the issues raised in the motion.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 2 day of July, 2004, served a copy of the foregoing by United States mail, postage prepaid and properly addressed, and/or by hand-delivery, to AUSA Michael Whisonant, United States Attorney's Office, 1801 4th Avenue North, Birmingham, AL 35203.

RICHARD S. JAFFE